IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1545 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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AJAY NAVINCHANDRA JOSHI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MILIND R KULKARNI for Appellant(s) : 1,
MR PD BHATE, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 30/08/2007

ORAL JUDGMENT

1. The appellant-orig.accused (hereinafter referred to as 'the appellant') has preferred the present appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction dated 07th October 2003 passed by the learned Additional

Sessions Judge, 6th Fast Track Court, Rajkot in N.D.P.S. Special Sessions Case No.2 of 2003, whereby the learned trial Judge has held the appellant guilty for the offence punishable under Sections 20 and 31 of the Narcotic, Drugs and Psychotropic Substances Act (hereinafter referred to as 'the Act') and sentenced him to undergo rigorous imprisonment for six months and a fine of Rs.10,000/- and in default rigorous imprisonment for one month for the offence punishable under Section 20 of the Act; and so far as the offence punishable under Section 31 of the Indian Penal Code is concerned, the appellant is asked to undergo rigorous imprisonment for five years and a fine of Rs.50,000/- and in default to undergo rigorous imprisonment for one year. The learned trial Judge has also ordered to run both the sentences concurrently.

2. The judgment and order of conviction and sentence under challenge is assailed on various grounds mentioned in paragraph no.5 of the memo of the appeal and Shri Milind Kulkarni, learned counsel appearing for the

appellant, has taken me through all these grounds and also through the judgment and order of conviction and sentence under challenge. After reading relevant portion of the evidence recorded during the course of trial and in response to the query raised by the Court, Shri Kulkarni has fairly submitted that at present the appellant is in prison. He has undergone practically the substantive part of imprisonment imposed by the learned trial Judge and the appellant is not pressing the present appeal against the judgment and order of conviction, but his alternative submission on the quantum of punishment imposed by the learned trial Judge needs consideration and this Court may record appropriate verdict on the alternative argument advanced by him.

3. In view of the fact that the appellant is not interested in assailing the legality and propriety of the conviction imposed by the learned trial Judge, now only the sentence imposed by the learned trial Judge shall have to be evaluated keeping in mind the relevant provisions of Section 20 as well as Section 31

of the Act. The amendment made in Section 20 of the Act has come into force with effect from 02nd October 2001. So the case of the prosecution was required to be dealt with under the amended provisions of the said Section 20 and the old Section 20 or any repealed provision had no room to play.

4. To appreciate the submissions made by the learned counsel for the appellant before the learned trial Judge, when he was heard on the point of punishment and even the submissions made by Shri Kulkarni before this Court, firstly this Court will have to state some basic facts which are reflected in the charge Ex.2. The allegation of the prosecution is that the appellant was found in conscious possession of 'Charas' at about 20.45 hrs. near Jubilee Baug, Opp. Shrinath Travels on 03rd January 2003. It is the case of the prosecution that the prohibited substance 'Charas' was in three different pieces weighing about 100 grams. It was something less then 100 grams and thereby, the appellant has committed offence punishable under Section

20 of the Act. Shri Kulkarni has no grievance about the punishment imposed by the learned trial Judge in respect of offence punishable under Section 20 of the Act because the quantum of punishment imposed by the learned trial Judge was within the ambit of scheme of Section 20 of the Act keeping in mind the quantity of 'Charas' which was found from the appellant. As per Section 20(b)(ii)(A) of the Act, the learned trial Judge could have imposed substantive sentence for six months and a fine of Rs.10,000/-, which was the outer limit. It is submitted that beyond the said limit, no imprisonment could have been imposed by the learned trial Judge. Some lesser punishment could have been imposed looking to the language of the said Section 20(b)(ii)(A) of the Act. But in the present case, the learned trial Judge had decided to impose maximum punishment provided under the said Section. However, according to Shri Kulkarni, the imprisonment of five years imposed along with a fine of Rs.50,000/- for the offence punishable under Section 31 of the Act is bad in law as the same is not in accordance with

law. The attention of the learned trial Judge was also drawn and the submissions made by the learned counsel appearing for the appellant before the learned trial Judge are reflected in paragraph no.7 of the second operative portion of the judgment and order under challenge. It would be beneficial to reproduce the said relevant paragraph no.7 of the second operative part of the judgment and order under challenge at page no.16 of the said judgment, which reads as under :

> “07. Shri S.K. Vora, the ld. Advocate for the accused has been heard by this Court on the question of sentence, which is required to be imposed on the accused in the interest of justice. Shri Vora has argued that the accused has been convicted by this Court for possessing small quantity of 100 Gram Charas for 6 months. Hence, as provided U/s.31(1) of N.D.P.S. Act, enhanced punishment of 9 months may be imposed on the accused. He has further argued that this Court cannot impose 10

years punishment and a fine on the accused as provided under the provision of Sec.31 of the N.D.P.S. Act."

5. It is argued by Shri Kulkarni that there was no scope for the learned trial Judge to read the old scheme of Section 20 of the Act while imposing imprisonment to the appellant. It was not a matter of dispute before the learned trial Judge that the appellant was found guilty at the end of second prosecution instituted against him. The appellant himself has admitted during the course of examination under Section 313 of the Code of Criminal Procedure, 1973 that he was held guilty for the offence punishable under the provisions of the Act and was imposed sentence for two years' imprisonment, and to a pay a fine of Rs.2500/-, and even the learned trial Judge has discussed this aspect. So the provision of Section 31 of the Act would attract. The additional charge of Section 31 was framed against the appellant. It is necessary to quote relevant provision of Section 31 of the Act, which is reproduced as under :

"31. Enhanced punishment for offences after previous conviction : (1) If any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under this Act is subsequently convicted of the commission commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence punishable under this Act ***with the same amount of punishment*** shall be punished for the second and every subsequent offence with rigorous imprisonment for a term which may extend to one-half of the maximum term of imprisonment and also be liable to fine which shall extended to one-half of the maximum amount of fine.

(2) Where the person referred to in sub-section (1) is liable to be punished with a minimum term of

imprisonment and to a minimum amount of fine, the minimum punishment for such person shall be one-half of the minimum term of imprisonment and one-half of the minimum amount of fine :

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding the fine for which a person is liable.

(3) Where any person is convicted by a competent court of criminal jurisdiction outside India under any corresponding law, such person, in respect of such conviction, shall be dealt with for the purposes of sub-sections(1) and (2) as if he had been convicted by a court in India."

(Emphasis Supplied)

6. The said Section 31 of the Act provides for enhancement of punishment for the offence after previous conviction. According to Shri Kulkarni, the sub-section (1) of Section 31 of the Act was relevant when the quantum of

punishment was to be determined by the learned trial Judge. When the effect of previous conviction was not a matter of dispute, the learned trial Judge could have enhanced the punishment but the same could not have exceeded three months i.e. one-half of the period of imprisonment provided under Section 20(b)(ii)(A) of the Act. The intention of the legislature is apparent on the face of the scheme of Section 31 of the Act. Section 31 of the Act provides that a person who has been previously convicted for any offence punishable under the provisions of the Act, shall be punished for the second and every subsequent offence with rigorous imprisonment for a term which may extend to one-half of the maximum term. When the maximum term prescribed under the law was six months, the appellant could not have been imposed rigorous imprisonment for more than 09 (nine) months, and that was the submission made before the learned trial Judge. The amount of fine also could have been imposed to one-half of the maximum amount of fine which could have been imposed for the offence for which the

appellant was found guilty. The learned trial Judge has grossly erred in reading the provision of old Section 20 of the Act and the quantum of punishment prescribed under the said Section. If it is the case of the prosecution before the learned trial Judge that the appellant had a history of previous conviction, the charge under Section 31 of the Act might have been mentioned in the final report under Section 173 of the Code of Criminal Procedure, 1973, otherwise at an appropriate stage even the charge could be amended as that had happened in the present case. At the time of commission of the first offence, the old law prior to amendment of the year 2001 was in force. But at the time of second offence, the relevant provision had been amended. Section 20 of the Act provides for punishment for contravention in relation to 'cannabis' (hemp) plant and 'cannabis'. The 'cannabis' is defined in the definition (iii) of Section 2 of the Act. The said definition clearly states that the cannabis is divided in three categories; (i) 'Charas', (ii) Ganja and (iii) any mixture with or

without any neutral material of any of the above forms of cannabis or any drink prepared therefrom. So three pieces found from the appellant, in the present case, would fall in the first category of cannabis. Under the provisions of old Section 20 of the Act, the punishment prescribed for cannabis other than 'Ganja' i.e. material falling in the category (ii) or (iii) of the definitions. The punishment prescribed was not to be less than 10 years and the maximum punishment prescribed was for 20 years. For the sake of brevity and convenience, it would be appropriate to reproduce the old Section 20 of the Act, which was operative on the date of the first offence committed in the year 2000, which is as under:

> “Repealed Section 20 : Punishment for contravention in relation to cannabis plant and cannabis : Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder:

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable,-

(i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;

(ii) where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh and which may extend to two lakh rupees :

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

7. If the language of the said Section 31 of the Act which was operative and in force from 02nd October 2001, is read, the scheme of amended Section 20 of the Act only was required to be read. The words used in Section 31 of the Act "the offence punishable under this Act ***with the same amount of punishment*** shall be punished for ..." (emphasis supplied). It is not prompt for the learned trial Judge to refer to the old scheme of Section 20 of the Act. The learned trial Judge has not assigned any good or logical reasons for not accepting the submissions made by the learned counsel appearing for the appellant. As such there is no reason, the learned trial Judge has expressed his opinion in paragraph no.11 of second part of judgment. There was no prescribed punishment under Section 20 of the Act for 10 years and a fine of Rs.1 lakh on

the study book. So the words “with the same amount of punishment” used in Section 31 of the Act would not confer jurisdiction upon the Court to read the quantum of punishment prescribed under the provisions of old Section 20 of the Act at the time when the appellant was held guilty firstly. This Court finds that there is enough force in the arguments advanced by Shri Kulkarni. The learned trial Judge had no jurisdiction or authority under the law to impose rigorous imprisonment for five years and a fine of Rs.50,000/- under Section 31 of the Act.

8. Shri P.D. Bhate, learned Additional Public Prosecutor, in response to the query raised by the Court, has fairly accepted that the learned trial Judge has erred in interpreting the nitty-gritty of Sections 20 and 31 of the Act, and also in reading the provision which was not in existence at the time of commission of second offence.

9. Shri Kulkarni, learned counsel appearing for the appellant, fairly submits that the appellant may be imposed rigorous imprisonment

for 09 (nine) months and additional amount of fine of Rs.5,000/-, over and above the substantive sentence and the amount of fine imposed for the offence punishable under Section 20 of the Act.

10. As the appellant has not assailed the judgment and order of conviction, the appeal is required to be allowed partly by modifying and reducing the judgment and order of sentence imposed by the learned trial Judge for the offence punishable under Section 31 of the Act. The imposition of punishment for the offence punishable under Section 20 of the Act was a matter of discretion before the learned trial Judge and as the appellant is held responsible second time for the grave offence, no leniency could have been shown even by the learned trial Judge so far as the punishment imposed under Section 20 of the Act is concerned. For short, the appeal is required to be allowed partly.

11. So in view of aforesaid observations and discussion, the present appeal is hereby partly allowed. The judgment and order of

conviction dated 07th October 2003 passed by the learned Additional Sessions Judge, 6th Fast Track Court, Rajkot in Special Case No.2 of 2003 is hereby upheld and the substantive sentence imposed by the learned trial Judge is hereby modified and reduced to the extent that the appellant now shall undergo rigorous imprisonment for 09 (nine) months i.e. six months for of offence punishable under Section 20 of the NDPS Act + three months for the offence punishable under Section 31 of the NDPS Act; and to pay a fine of Rs.15000/- i.e. Rs.10,000/- for of offence punishable under Section 20 of the NDPS Act + Rs.5,000/- for the offence punishable under Section 31 of the NDPS Act; and the indefault punishment is also modified to the extent of 4½ months for both the offences and the appellant shall undergo rigorous imprisonment for said period of 4½ months' period on that count. If the appellant has already served the aforesaid punishment, he shall be set at liberty forthwith, if he is not required by the Jail Authorities for any other offence.

(C.K. Buch, J)

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